

July 1, 2024

Via ECF

The Honorable Allyne R. Ross
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Mirkin, et al. v. XOOM Energy, LLC, et al., No. 18 Civ. 2949 (ARR) (JAM)

Dear Judge Ross,

On behalf of Plaintiff and the Class, we write to notify the Court that Plaintiff hereby withdraws her Motion *In Limine* No. 1, ECF 233 at § I, without prejudice. MIL No. 1 addressed the appropriate allocation of burdens of proof in this matter. Plaintiff contends that, while she maintains the ultimate burden to prove liability and will do so by showing XOOM did not charge a rate determined solely by its supply costs plus a fixed and reasonable margin, XOOM bears the burden to prove the mechanics of its defense that it incorporated supply costs into its margins to yield a reasonable and fixed margin. However, given the Court's ruling in the Decertification Denial Order that “[w]hether plaintiff can satisfy her burden depends on disputed questions of fact,” ECF 246 at 11, Plaintiff believes that the issues raised by her MIL No. 1 would be more appropriately addressed later in the proceedings when the factual issues come into better focus.

Plaintiff and the Class respectfully reserve the right to revisit the issue of burdens of proof at a later point in the litigation should it become appropriate.

Thank you for the Court's attention to this matter.

Respectfully Submitted

/s/ J. Burkett McInturff
J. Burkett McInturff

*Class Counsel for Plaintiff and the
Class*

cc: All Counsel of Record (*via ECF*)